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STATUTES CITED:

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Supreme Court of the United States

October Term, 1954

No. .....

THOMAS CONSTANCE,

Petitioner,

against

ARTHUR J. HARVEY, Trustee in Bankruptcy of FRANCIS THOMAS REILLY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner respectfully prays that a writ of certiorari issue to review the decision and decree of the United States Court of Appeals for the Second Circuit, reported in (Fed. 2nd), affirming an order made by Hon. James T. Foley, District Judge of the United States District Court, Northern District of New York (reported in Fed. 2nd) which order affirmed an order made by Hon. John J. Ryan, Referee in Bankruptcy for the United States District Court, Northern District of New York (not reported), adjudging petitioner's chattel mortgage lien null and void as against the respondent trustee in bankruptcy of one FRANCIS THOMAS REILLY a bankrupt. The opinions of the

United States Court of Appeals, the District Judge and the Referee are contained in the record on appeal in the United States Court of Appeals, nine copies of which are being submitted with this petition in accordance with the rules of this Court.

Petitioner seeks to invoke the jurisdiction of this Court upon the grounds that the United States Court of Appeals has decided an important state question in a way in conflict with applicable New York State law, and has decided an important question of federal law, which has not been, but should be settled by this Court.

There were two decrees of the United States Court of Appeals. The first decree reversed the order of the District Court and remanded the proceedings to the Referee for hearing in accordance with its opinion. This decree was made and entered on July 7, 1954. Thereafter and upon a rehearing on August 3, 1954, the United States Court of Appeals recalled its first decree and affirmed the order of the District Judge. The second decree of the United States Court of Appeals was made and entered on August 3, 1954.

Jurisdiction to review the decree in question by writ of certiorari is conferred on this Court by virtue of Title 11 of the United States Code (Bankruptcy) Section 47, subdivision c, and Title 28 of the United States Code, Section 1254, subdivision 1.

Questions Presented for Review

1. Where a mortgage, affecting chattels in the State of New York, is presented for filing, together with the proper filing fee, to the officials designated by statute to

accept such instrument for filing, is such mortgage deemed filed on the day it is so presented.

2. Is a mortgage affecting chattels in the State of New York invalid as to creditors of the mortgagor, if the official designated by statute to accept such mortgage for filing fails to file the mortgage, upon receipt by him of the mortgage and filing fee.

3. If an official designated by the Statutes of the State of New York to accept for filing a chattel mortgage, errs in filing such mortgage, does such error affect the validity of the mortgage as against the creditors of the mortgagor.

4. Is the validity of a mortgage on chattels in the State of New York affected against creditors of the mortgagor, if the official designated by the Statutes of the State of New York to accept such mortgage for filing, receives the mortgage and filing fees, fails to file the mortgage, but returns it to the mortgagee, and ten months thereafter accepts said mortgage and files it.

5. Has a Trustee in Bankruptcy the right to attack the validity of a mortgage executed by the mortgagor about two years before a petition in bankruptcy is filed against such mortgagor, where such mortgage was timely presented for filing and filing fees tendered to the official designated by the State of New York to accept such mortgage for filing, but such official refuses to file the mortgage, but about ten months thereafter, and at least eleven months before the petition in bankruptcy is filed against the mortgagor, accepts and files such mortgage.

6. Did the United States Court of Appeals decide an important state question in a way in conflict with applicable state law.

Statutes Involved

1. Article 10, Section 230 of the Lien Law of the State of New York which may be found in Book 32 of McKinney's Consolidated Laws of New York, at p. 351.

2. Article 10, Section 233 of the Lien Law of the State of New York, which may be found at p. 372 of McKinney's Consolidated Laws.

3. Section 70(c) of the Bankruptcy Act which may be found in Title 11 of the United States Code, Annotated, Section 110(c) at p. 11.

4. Article 10, Section 232 of the Lien Law of the State of New York may be found at p. 369 of McKinney's Consolidated Laws.

The foregoing provisions of law are lengthy and their pertinent text are set forth in the appendix of this petition.

Statement of the Case and Basis for Federal Jurisdiction

On November 23, 1949, petitioner, Thomas Constance, sold a certain diner located in Albany, N. Y., to Francis T. Reilly, for the sum of $35,000.00. Petitioner received from Reilly the sum of $15,000.00 in cash, together with a purchase money chattel mortgage executed by Reilly for the sum of $20,000.00 representing the balance of the purchase price. Reilly, at the time of the execution of this mortgage, resided in Watervliet, Albany County, New York.

The attorney for Constance, the petitioner mortgagee, on November 25, 1949, mailed a copy of this chattel mortgage to the Town Clerk of Watervliet, New York, together

with the filing fees, with instructions to file such mortgage. The Town Clerk of Watervliet was the proper official designated by New York Statute to file such mortgage.

The Town Clerk of Watervliet received the mortgage and filing fees but instead of filing the mortgage, returned the same to the attorney for petitioner mortgagee, advising that the mortgage be filed with the Clerk of the County of Albany.

In returning such mortgage, without filing the same, the Clerk of the Town of Watervliet erred and the lower courts have held that such action of the Clerk of the Town of Watervliet was the filing clerk's error.

On October 5, 1950, about ten months thereafter, the Town Clerk of Watervliet actually accepted the chattel mortgage for filing and did file said chattel mortgage.

Almost one year thereafter, and on the 23rd day of September, 1951, an involuntary petition in bankruptcy was filed against Reilly, the mortgagor, and said mortgagor was adjudicated a bankrupt on October 3, 1951. Arthur J. Harvey, the respondent, was elected the trustee of Reilly, the bankrupt mortgagor.

The respondent trustee refused to recognize the validity of petitioner's mortgage and a stipulation was made between petitioner mortgagee and trustee respondent, permitting the sale of the mortgaged chattels, provided that the proceeds of such sale be held by respondent trustee subject to the adjudication of the validity of petitioner's mortgage.

The mortgaged chattels were sold for $22,150.00.

Petitioner thereupon made application to the Referee in Bankruptcy for an order declaring the chattel mortgage hereinabove described to be a good and valid lien against the proceeds of the sale of the diner. This application was heard before the Referee in Bankruptcy, at which time it was established that there was a sum of $15,650.00 due under the terms of the chattel mortgage and that the mortgage was filed in accordance with the facts hereinabove set forth.

The Referee held this mortgage to be invalid. An application to review this decision was made before the District Judge who affirmed the Referee's findings. An appeal from this decision was taken to the United States Court of Appeals, which Court at first reversed the orders and remanded the matter for a further hearing in accordance with the opinion of the United States Court of Appeals and, thereafter, upon a rehearing of such appeal, recalled its decision and affirmed the District Court.

The Federal Court acquired jurisdiction in the first instance by reason of the fact that the petition in bankruptcy against Reilly was filed in the United States District Court of the Northern District of New York. The Federal Court had jurisdiction, in the first instance, of the matter involved. The Bankruptcy Court, taking jurisdiction of the Bankrupt's property, was empowered to hear and determine all matters affecting title of the bankrupt's property and the Referee and the District Court Judge, therefore, had jurisdiction in the first instance of the issues involved in this litigation.

Argument in Support of Writ of Certiorari

Petitioner respectfully submits that the laws of the State of New York and the various decisions in the Courts of the State of New York, including the Court of Appeals, pertaining to the issues involved in these proceedings, do not support the conclusions reached by the lower courts.

The law of the locality in which the transaction took place, governs the law that the Federal Court must apply, and that since the transaction took place in the State of New York, the laws of the State of New York affecting chattel mortgages should determine the issues in the case at bar.

Section 230 of the Lien Law of the State of New York pertaining to the facts in the case at Bar provides:

> "Every mortgage of goods and chattels is absolutely void as against the creditors of the mortgagor and as against subsequent purchasers and mortgagees in good faith and for a fair consideration unless the mortgage or a true copy thereof is filed as directed in the article."

Section 232 of the Lien Law of the State of New York directs the filing of a chattel mortgage in the office of the city or town clerk in the city or town where the mortgagor, if a resident of the state, resides at the time of the execution thereof.

It is not disputed that the mortgagor resided in the town of Watervliet, Albany County, State of New York. It is respondent's contention that on November 28, 1949, when the Town Clerk of Watervliet received the mortgage for

the purpose of filing, together with the filing fee, that such mortgage was deemed filed in his office at that time.

The Court of Appeals of the State of New York, interpreting the filing of liens such as chattel mortgages, in the case of *Manton* v. *Brooklyn & Flatbush Realty Co.*, 217 N. Y. 284, stated:

> "Many decisions uphold the conclusion that the existence of a lien is not affected by the omission of a public officer to enter it in the public records."

Section 233 of the Lien Law of the State of New York imposes a duty upon the official designated to file every such instrument (referring to chattel mortgages) presented to him for that purpose.

The Appellate Division of the Supreme Court of the State of New York, in the case of *New York County National Bank* v. *Wood*, 169 App. Div. 817, 153 N. Y. S. 860, affirmed in the Court of Appeals at 222 N. Y. 662, held:

> "The rights of the plaintiff cannot be defeated because the clerk did not retain the paper and refused to file it. The rights of a party cannot be destroyed because a public official refuses to do his duty. * * * The plaintiff's assignment must, therefore, be considered as having been filed at the time it was first delivered to the clerk for the purpose of filing, * * *".

The United States District Court of New York, in passing upon the failure of a public official to file an instrument, stated *In re Labb*, 42 Fed. Supp. 543:

> "It is not encumbent upon one presenting to the recording officer for recording an instrument which the statute provides to be recorded to see that such

> officer does his duty. The one presenting it has done all that is required of him when he delivers an instrument which contains the essentials of a valid contract, thereafter the burden of responsibility of mistakes is upon the officer."

The Court of Appeals of the State of New York, in the case of *President, etc. of the Manhattan Company* v. *Laimbeer,* 108 N. Y. 578, held:

> (p. 585) "In the matter of deeds and mortgages, it is constantly spoken of that such papers are recorded when left at the clerk's office for such purpose; the theory of the law being that the record is made when delivered to the clerk for that purpose. The record is then considered to have been accomplished, and the physical act of transcribing the contents of the paper into a book, at length, is to be performed by the public officer; and it seems to me to be contrary to reason and to principle, to hold an individual bound to such grave liabilities, as this case is an example of, founded upon the failure of a public officer to do an act prescribed by the statute."

It would seem clear that the foregoing decisions support petitioner's contention that the error made by the Town Clerk of Watervliet, in refusing to file the chattel mortgage when first presented to him, did not affect the validity of the chattel mortgage.

The Circuit Court of Appeals, however, attempted to distinguish these decisions from the case at Bar. In so doing, the Circuit Court of Appeals erred.

The question of filing mortgages in the State of New York is an important question and the decision of the United

States Court of Appeals is in conflict with the applicable state law and, therefore, such question should be reviewed by this Court.

Moreover, the question of a priority of mortgages and the validity of mortgages is an important question of Federal law, in so far as it affects proceedings in bankruptcy.

The question of the effect of errors committed by filing officers has not been decided by this Court and this Court should, therefore, settle the question.

The attempt by the Circuit Court of Appeals to distinguish the reported cases with the case at Bar, in order to reach the conclusion that it did, is not supported by any decisions in this Court or in any Court in the land.

The United States Court of Appeals held that the inaction of respondent's attorney after the return to him of the mortgage unfiled, for a ten month period, was sufficient to bar petitioner's lien against the chattels. Respondent respectfully submits that the cases cited in the various courts of the State of New York do not support this conclusion. The acceptance by the filing clerk of the mortgage ten months after the first filing should not be construed in deprivation of the rights of petitioner. The filing clerk merely corrected his error ten months after he made it.

At this point, petitioner desires to point out to this Court that there is no evidence in the record of any intervening lienor's rights between the date that the mortgage was presented for filing and the date that the filing clerk actually did file such mortgage.

Section 70(c) of the Bankruptcy Act, 11 U. S. C. A., Section 110(c), confers upon a trustee in bankruptcy the

status of a lien creditor as to any property of the bankrupt with respect to which a hypothetical creditor of a bankrupt could have obtained a lien, by legal or equitable proceedings at the date of the bankruptcy. Applying this law to the case at Bar, the record establishes that the filing clerk erred in filing a mortgage; that such error was corrected by him ten months later; that almost a year thereafter a petition in bankruptcy was filed against the mortgagor. In view of the fact that the corrected filing date would be deemed the date of the original filing, under the New York Court decisions, no creditor upon the date of the bankruptcy could have successfully attacked the validity of the mortgage and, therefore, the trustee in bankruptcy could obtain no greater right than the creditor described in Section 70(c) of the Bankruptcy Law.

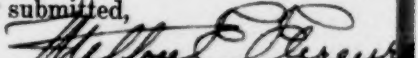
Under the circumstances, it is submitted that the United States Court of Appeals erred in its decision in refusing to follow the New York State Law.

CONCLUSION

It is respectfully submitted that the decree of the United States Court of Appeals is in conflict with applicable state law and that said United States Court of Appeals has decided an important question of Federal law, which has not been but which should be settled by this Court.

Dated, October 6th, 1954.

Respectfully submitted,



MILTON E. EHRENREICH,
Attorney for Petitioner.

APPENDIX A

Title 11 of the United States Code (Bankruptcy), Section 47, Subdivision (c).

The Supreme Court of the United States is vested with jurisdiction to review judgments, decrees and orders of the United States Court of Appeals in proceedings under this title in accordance with the provisions of the laws of the United States, now in force or such as may hereafter be enacted.

• • •

Title 28 of the United States Code, Section 1254, Subdivision (1). Cases in the Courts of Appeal may be reviewed by the Supreme Court by the following methods:

1. By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of decree.

• • •

Sec. 230. *Chattel mortgages to be filed*

Every mortgage or conveyance intended to operate as a mortgage of goods and chattels or of any canal boat, steam-tug, scow or other craft, or the appurtenances thereto, navigating the canals of the state, which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, is absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith and for a fair consideration, unless the mortgage, or a true copy thereof, is filed as directed in this article.

• • •

Article 10, Sec. 233 of the Lien Law of the State of New York.

Sec. 233. *Filing and entry*

Such officers shall file every such instrument presented to them for that purpose, and indorse thereon its number and time of its receipt.

• • •

Title 11 of the United States Code, Sec. 110(c). The Trustee, as to all property, whether or not coming into possession or control of the Court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of the bankruptcy, shall be deemed vested as of such date, with all the rights, remedies and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists.

• • •

Article 10, Sec. 232 of the Lien Law of the State of New York.

Sec. 232. *Where filed*

Every other chattel mortgage, or an instrument intended to operate as such, or a true copy thereof, must be filed in the town or city where the mortgagor, if a resident of the state, resides at the time of the execution thereof, • • •. In very other city or town of the state, in the office of the city or town clerk, unless there is a county clerk's office in such city or town, in which case it must be filed therein.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 247—October Term, 1953.

(Argued May 12, 1954 Decided July 7, 1954.)

Docket No. 23036

THOMAS CONSTANCE,

Petitioner-Creditor-Appellant,

v.

ARTHUR J. HARVEY,

Trustee-Appellee.

Before:

CHASE, *Chief Judge,* HINCKS and HARLAN, *Circuit Judges.*

Appeal from an order of the United States District Court for the Northern District of New York, James T. Foley, *Judge,* holding invalid, as against a Trustee in Bankruptcy, a certain chattel mortgage. Reversed and remanded.

MILTON E. EHRENREICH,
New York City,
for Petitioner-Creditor-Appellant.

HARVEY M. LIPSET,
Albany, New York,
for Trustee-Appellee.

HARLAN, *Circuit Judge*:

The question before us is whether a chattel mortgage given by Francis T. Reilly, the bankrupt, to Thomas Constance, the appellant, is valid as against Reilly's Trustee in Bankruptcy, the appellee.

On November 23, 1949, Constance sold to Reilly, residing at Watervliet, Albany County, N. Y., a roadside diner located in the City of Albany, N. Y. The purchase price was $35,000, payable $15,000 in cash and $20,000 by a purchase money mortgage executed by Reilly in favor of Constance.

On November 25, 1949, Milton E. Ehrenreich, the attorney for Constance, sent copies of the mortgage to the County Clerk of Albany County and the Town Clerk of Watervliet for filing, together with the appropriate filing fees. The copy of the mortgage sent to the Albany County Clerk was duly filed in his office in the City of Albany but the copy sent to the Watervliet Clerk was returned to Mr. Ehrenreich, with a notation "Filed in Albany." Concededly, Watervliet was the only proper place of filing, since (a) that was where Reilly, the mortgagor, resided, and (b) the County Clerk of Albany County, in which Watervliet was situated, had no office in Watervliet; and the filing in the Albany County Clerk's office was of no avail. New York Lien Law §232.[1]

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[1] §232. Where filed

* * * Every * * * chattel mortgage, or an instrument intended to operate as such, or a true copy thereof, must be filed in the town or city where the mortgagor, if a resident of the state, resides at the time of the execution thereof, and if not a resident, in the city or town where the property mortgaged is at the time of the execution of the mortgage. * * * In every other city or town of the state [other than New York City], in the office of the city or town clerk, unless there is a county clerk's office in such city or town, in which case it must be filed therein."

Mr. Ehrenreich testified that he took the Watervliet Clerk's notation to mean that Reilly had changed his residence to Albany, where the diner was located, and that he made no further effort to accomplish filing in Watervliet until October 5, 1950—over ten months later—when he sent a representative to Watervliet for that purpose. This time the Watervliet Town Clerk filed the instrument, and there was hearsay evidence, which was no objected to, that the Clerk then acknowledged that he had made an error in not filing the mortgage when he had originally received it in November 1949. It was found below that the Clerk had so erred.

Reilly was adjudicated a bankrupt on October 23, 1951, and Arthur J. Harvey was appointed Trustee. The sole asset of the estate was the diner which was sold by the Trustee for $22,150.00, against which proceeds Constance claims a valid lien to the extent of $15,650.00, the unpaid balance of the purchase price of the diner. The District Court confirming the Referee in Bankruptcy, has held the chattel mortgage invalid as against the Trustee.

The first question we have to decide is this: Was the effective filing date of this chattel mortgage shortly after November 25, 1949, when the Watervliet Clerk received the instrument and erroneously failed to file it, or on October 5, 1950, when the mortgage was actually filed at Watervliet? It is conceded that this question is to be determined under New York law.

The New York Lien Law makes chattel mortgages which have not been filed as provided therein void as against creditors of the mortgagor and subsequent good faith purchasers and mortgages for value, but specifies no time for filing. §§230, 232. The New York Courts hold that filing must be within a reasonable time after execution of the instrument. *Tooker* v. *Siegel-Cooper Co.*, 194 N. Y. 442, 154 N. Y. Supp. 889 (1909). Absent extenuating circum-

stances, it could scarcely be disputed that a delay of over ten months is not a filing within a reasonable time. It is argued, however, that this delay was excused by the mistake of the Watervliet Clerk, and we are referred to a number of cases in which it has been held that the failure or refusal of a public official to file an instrument required to be filed is not to be charged against one claiming under it. *Manton* v. *Brooklyn & Flatbush Realty Co.*, 217 N. Y. 284 (1916); *Pres. etc. of the Manhattan Company* v. *Laimbeer*, 108 N. Y. 578 (1888); *New York County Nat. Bank* v. *Wood*, 169 App. Div. 817, 153 N. Y. Supp. 860 (1st Dept. 1915), *aff'd* 222 N. Y. 662; *In re Labb*, 42 F. Supp. 542 (W. D. N. Y. 1941).

We think these cases are distinguishable from the one before us. In each of them the fault was entirely that of the public official involved, without any neglect on the part of the person attempting to file, or there were no intervening rights of third parties. Here the Referee found that the attorney for the mortgagee knew that the mortgagor resided at Watervliet, and the attorney himself testified that he understood the law to require filing there. Yet he did nothing further to accomplish filing in Watervliet until over ten months after the Clerk had returned the mortgage to him without filing, and offered no excuse for this inaction. The circumstances here are quite different from those in *New York County Nat. Bank* v. *Wood, supra*, where the managing clerk of the lienor's attorney took back to his superior the instrument which he had attempted to file, and the matter was then promptly followed up and filing accomplished within less than one hour.

In the present case, the inaction of the appellant's attorney was in effect an acquiescence for more than ten months in the Watervliet's Clerk's failure to file the mortgage. As was said by Cardozo, *J.* in the *Manton* case, *supra* (at p. 288): "If the act of the lienor has made notice impossible,

he must be held to have estopped himself from enforcing his lien against persons who would otherwise be misled to their prejudice." We think that the Referee and the District Court were correct in holding that the filing in the present case was not seasonable under the New York law.

This, however, does not dispose of the case, as the District Court seems to have thought, for the belated filing on October 5, 1950 may nonetheless have been effective as against Reilly's Trustee in Bankruptcy. Section 70(c) of the Bankruptcy Act, 11 U. S. C. A. §110(c), upon which the Trustee principally relies, clothes the Trustee with the status of a lien creditor as to any property of the bankrupt with respect to which a hypothetical creditor of the bankrupt "could have obtained a lien by legal or equitable proceedings at the date of bankruptcy." By definition the "date of bankruptcy" is the "date when the petition was filed." Bankruptcy Act §1(13), 11 U. S. C. A. §1(13). But under New York law the filing of this chattel mortgage, even though belated, was good as to all creditors of Reilly who became such *subsequent* to the filing of the mortgage, whether belated or not. *In re Myers*, 24 F. 2d 349 (2d Cir. 1928); *In re Ideal Steel Wheel Co.*, 25 F. 2d 651 (2d Cir. 1928). Hence under §70(c) the Trustee did not have the status of a lien creditor with respect to this property unless the petition in bankruptcy was filed *prior* to October 5, 1950, when the chattel mortgage was filed by the Watervliet Town Clerk. 4 Collier on Bankruptcy pp. 1272, 1273, 1287-1293. The record shows that Reilly was *adjudicated* a bankrupt on October 23, 1951, more than a year after the mortgage was filed, but it fails to show when the petition in bankruptcy was filed. Hence we are unable to determine whether under §70(c) the belated filing by the mortgagee was valid or invalid as against the Trustee.

Nor is the position of the Trustee aided by §70(e) of the Bankruptcy Act, 11 U. S. C. A. §110(e), making void as against a Trustee any "obligation incurred by a debtor

adjudged a bankrupt * * * which, under any Federal or State law applicable thereto, is * * * voidable * * * by any creditor of the debtor, having a claim provable * * *" against the estate. Under New York law this chattel mortgage was invalid only as to creditors of Reilly becoming such *prior* to October 5, 1950, when the mortgage was filed at Watervliet, and unless there was at least one such creditor the belated filing was nevertheless good as against the Trustee. See *Zamor* v. *Goldblatt*, 194 F. 2d 933 (2d Cir. 1952); *In re Myers, supra.* Here again the record is deficient, since it fails to show that any of the bankrupt's creditors had become creditors prior to October 5, 1950. So again we are not in a position to determine whether under §70(e) the mortgage was valid or invalid as against the Trustee.

In light of these controlling considerations, it becomes clear that on this record the order below cannot stand. However, rather than reversing for dismissal, we are constrained to remand the case to the District Court for further findings, with instructions to grant the appellant's lien petition if it be found that the petition in bankruptcy was filed *after* October 5, 1950, and that none of the bankrupt's creditors, having a provable claim, became a creditor *prior* to October 5, 1950, and otherwise to dismiss the petition.

Reversed and remanded.

APPENDIX C

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of August, one thousand nine hundred and fifty-four.

Present:

HON. HARRIE B. CHASE, *Chief Judge.*
HON. CARROLL C. HINCKS,
HON. JOHN M. HARLAN, *Circuit Judges.*

In the Matter
of
FRANCIS THOMAS REILLY,
Bankrupt,
THOMAS CONSTANCE,
Creditor-Appellant,
ARTHUR J. HARVEY,
Trustee-Appellee.

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

/s/ A. DANIEL FUSARO,
Clerk.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 247—October Term, 1953.

(Petition filed July 21, 1954 Decided August 3, 1954.)

Docket No. 23036

THOMAS CONSTANCE,

Petitioner-Creditor-Appellant,

v.

ARTHUR J. HARVEY,

Trustee-Appellee.

PETITION FOR REHEARING

Before:

CHASE, *Chief Judge,* HINCKS and HARLAN, *Circuit Judges.*

PER CURIAM:

Appellant's Petition for Rehearing sets forth nothing which persuades us that we were wrong in concluding that the chattel mortgage was not timely filed. We must therefore deny the Petition for Rehearing.

The Court, however, *sua sponte* takes this occasion to correct the opinion already filed in one respect in which we think we were mistaken. We there stated that §70(c) of the Bankruptcy Act, 11 U. S. C. A. §110(c), did not avail the Trustee because the record failed to show that the petition in bankruptcy had been filed prior to the ac-

tual recording of the mortgage. On further consideration we think that is not so in view of the provisions of §230 of the N. Y. Lien Law, as construed by the New York Courts, making unrecorded chattel mortgages void as to *simple contract creditors* becoming such, without notice, prior to actual recording—see *Karst* v. *Gane*, 136 N. Y. 316, 323 (1892); *In re Shay's Estate*, 285 N. Y. Supp. 379 (Surrogate's Court, Livingston Co. 1935)—in contrast to the provisions of §65 of the N. Y. Personal Property Law making unrecorded *conditional sales contracts* void as to creditors, without notice, who have acquired *liens* on the goods prior to recording of the contract. Since an existing creditor, without notice of the chattel mortgage, could have obtained a lien at the time of the filing of the petition in bankruptcy, and since under §70(c) of the Bankruptcy Act the Trustee was entitled to be put in the position of an "ideal" hypothetical creditor—*Hoffman* v. *Cream-O-Products*, 180 F. 2d 649 (2d Cir.), cert. denied 340 U. S. 815 (1950)—we think his position must prevail over that of the mortgagor-appellant.

This leads us to correct our original opinion in this respect, and on this ground to affirm the judgment below.

Petition for Rehearing denied. Judgment below affirmed.